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In the Supreme Court of the United States

OCTOBER TERM, 1975

NANCY C. TERRIBERRY, BRUCE T. TERRIBERRY AND SARASOTA BANK AND TRUST CO. on Behalf of the Estate of G. GILSON TERRIBERRY,
Petitioner

versus

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on August 8, 1975.

OPINIONS BELOW

The opinion of the District Court for the Middle District of Florida holding for Petitioner is reported at 74-2 USTC #13,002. The opinion of the split Court of Appeals for the Fifth Circuit reversing, not yet reported, appears in the Appendix hereto. A complete copy of the detailed opinion of the District Court was adopted as part of the dissenting opinion and appears in the Appendix hereto as part of the Fifth Circuit's opinion.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on August 8, 1975. A timely petition for rehearing was denied on September 23, 1975, and this petition for certiorari was filed within ninety days of that date. This court's jurisdiction is invoked under 28 USC Sec. 1254(1).

QUESTIONS PRESENTED

This is an estate tax case involving the taxation of life insurance on the life of a trustee where the "ownership" of said policies is held solely in a fiduciary capacity. The issue here is whether Section 2042 of the Internal Revenue Code of 1954 requires taxation of life insurance held solely in a fiduciary capacity where the decedent insured had no beneficial interest in the subject policies and his sole power over the policies was the right as co-trustee (with consent of the other trustee) to select one of the settlement options.

Stated in the terms of the Internal Revenue Code Section, the question is whether a decedent insured who is merely a co-trustee of a trust (which he did not create and had no beneficial interest therein) can be deemed to have incidents of ownership in life insurance policies constituting a part of the trust corpus by reason of having the power as co-trustee to participate in the selection of a settlement option.

The basic issue involves the consideration of the following:

1) Whether the test of taxability of life insurance policies held solely in a fiduciary capacity is (a) whether the decedent trustee possessed *any powers* in a fiduciary capacity consti-

tuting incidents of ownership (Fifth Circuit test) or (b) whether the decedent trustee possessed any powers in a fiduciary capacity constituting incidents of ownership which *could be exercised for his own benefit* (Sixth Circuit and Second Circuit test).

2) Whether the right to select a settlement option exercisable solely in a fiduciary capacity is merely an investment power or amounts to an incident of ownership under Section 2042 which will cause taxability of the policy in the trustee's estate.

3) Whether the transfer of life insurance policies to a revocable inter vivos (Living) trust is deemed to transfer taxable incidents of ownership to a co-trustee who is neither the grantor of the trust nor transferor of the policies.

STATUTE INVOLVED

Section 2042, Internal Revenue Code of 1954, provides:

> "The value of the gross estate shall include the value of all property . . . . (2) To the extent of the amount receivable by all other beneficiaries as insurance under policies on the life of the decedent with respect to which the decedent possessed at his death any of the incidents of ownership, exercisable either alone or in conjunction with any other person."

STATEMENT OF THE CASE

Since the 1940s, Nancy Terriberry was the absolute and sole owner of seven insurance policies on the life of her

husband, Gilson. In 1964 the Terriberrys moved to Florida. They were advised that the cost of probate administration was very high and that such cost could be eliminated if each created a revocable (living) trust and transferred all of their assets to his or her trust.

Each of the Terriberrys wished to retain complete control of their respective estates but were advised that Florida law required that someone other than the grantor-beneficiary be named co-trustee of such a revocable or living trust.

Pursuant to such advice and to avoid probate administration and to retain control over her individual assets, on January 23, 1964, Nancy as grantor entered into a revocable trust agreement with herself and Gilson as co-trustees and the Sarasota Bank and Trust Company as successor co-trustee.

Nancy appointed the decedent as co-trustee of her trust solely for convenience to insure that said revocable trust was valid under Florida law.

Nancy desired to transfer the seven life insurance policies to the trust but before executing the trust instrument, she wrote each of the two insurance companies involved enclosing a copy of the trust agreement and advising them of her intention. In a letter of June 15, 1964, she stated relative to the provisions in her trust agreement restricting Gilson's authority as co-trustee to deal with the life insurance policies:

> "The purpose of the wording for my agreement is to make it clear that I have all the incidents of ownership of the policies on my husband's life and without the consent of any trustee(s) or bene-

> ficiary, may exercise any option, etc. given under these contracts."

In response to the June letter, Mutual Benefit indicated as to the five policies on decedent's life owned by Nancy that *even after transfer of ownership of said policies to said trust, Nancy's signature would be required to make any changes in the policies during her lifetime.* Connecticut Mutual indicated that a provision should be made for the disposition of the policies in the event the trust was not in existence at the time of the insured's death.

Thereafter, the trust agreement was executed and the seven life insurance policies were transferred by Nancy to her trust along with her other assets.

Under Nancy's trust, the rights and powers of decedent as a co-trustee in respect to the insurance policies were set forth in Sections 1, 2 and 3 of Article III of said trust as follows:

> "With respect to said insurance contracts, it is, however, expressly understood and agreed as follows:
>
> "1. That the transfer of ownership by the Grantor to the Trustee(s) of such insurance contracts shall not vest ownership of such contracts in the Grantor's husband, G. Gilson Terriberry, individually but only in his fiduciary capacity.
>
> "2. That the Grantor's husband, G. Gilson Terriberry, in the administration and ownership of said contracts of insurance, as Trustee or Co-Trustee hereunder, is expressly prohibited from

exercising any of the incidents of ownership thereof in his individual capacity and further prohibited from making any use, disposition, retention or other control thereof, either individually or as Trustee or Co-Trustee, except as herein directed.

"3. To the extent permitted by the contract of insurance and the insuring companies, but only to the extent that ownership of the contracts of insurance shall not become vested in the Grantor's husband, G. Gilson Terriberry as an individual, the Grantor and her husband, G. Gilson Terriberry, or either of them, as Trustee(s) may upon surrender or maturity of the insurance contracts elect a settlement option based upon the life of either the Grantor or her said husband, G. Gilson Terriberry, provided, they or either of them are, at the time of the election of such settlement option, a beneficiary of the trust."

Article V of Nancy's trust provides that the decedent could never act as sole trustee and Article II provided that Nancy had the absolute right at any time to revoke or amend her trust or to remove any trustee.

Decedent as trustee had no right under the trust agreement to change the beneficial ownership or to change or affect the time or manner of enjoyment of the policies or their proceeds, these all being governed by the provisions of the trust.

Decedent further had no right to any economic benefits under the policies on his life in the trust.

The trustees immediately appointed the Sarasota Bank as

agent for the trustees and deposited the insurance policies and other assets of the trust with the bank as agent. Gilson died on May 21, 1968.

The Government included the seven policies in Nancy's trust in decedent's estate although no other property in the trust was included in decedent's estate. The Government's theory of inclusion was that decedent in his fiduciary capacity as a co-trustee could, with the other trustee's consent, select one of the settlement options and that such right, even though held in a fiduciary capacity, constituted an incident of ownership under Section 2042 of the Internal Revenue Code causing taxability.

Petitioner paid the tax and filed suit in Federal District Court for refund. The District Court found for Petitioner detailing its reasons in a comprehensive opinion. The Fifth Circuit reversed in a two to one decision.

REASONS FOR GRANTING THE WRIT

1) THE DECISION BELOW DIRECTLY CONFLICTS WITH THE DECISIONS OF THE SECOND AND SIXTH CIRCUIT COURTS OF APPEAL AS TO THE PROPER INTERPRETATION OF INCIDENTS OF OWNERSHIP AND THE TAXATION OF INSURANCE POLICIES HELD ONLY IN A FIDUCIARY CAPACITY.

The conflict developed as follows:

Section 2042 provides that insurance is taxable in the gross estate of the insured, if he possessed at his death "any incidents of ownership." The Code Section does not define the term "incidents of ownership."

Treasury Regulations Section 20.2042 define the term as "generally speaking, the term has reference to the right of the insured or his estate to the economic benefits of the policy." The Regulations then give examples of powers constituting "incidents of ownership" such as the power to change the beneficiary, to surrender or cancel the policy, to assign the policy, to obtain a loan on the policy, etc. The right to select an optional mode of settlement is not listed as an incident of ownership in the Regulations nor in the Congressional Committee Reports in adopting Section 2042 and its predecessor.

On the contrary, the Board of Tax Appeal in *Billings v. Commissioner*, 35 B.T.A. 1147 (1937) determined that the right to select an optional mode of settlement was too limited and insignificant to constitute an incident of ownership within the meaning of the pre 1939 Code Section similar to present Section 2042(2) which decision was acquiesced to by the Service for approximately thirty-six years.

Note that in this case, the sole power decedent is alleged to have had as trustee was to participate in the selection of a settlement option.

Contrary to *Billings* and notwithstanding that the Regulations under Section 2042 *do not* mention this rather universal power contained in most policies as an "incident of ownership", the Fifth Circuit in *Estate of Lumpkin v. Commissioner*, 474 Fed. 2d 1092 (Fifth Cir. 1973), 73-1 USTC #12,909 determined, as to a group life policy, that an insured employee's right to select various settlement options (as well as individually design other means of payment) gave the employee the right to vary the time and manner in which the proceeds would be paid to the beneficiary of the

policy after his death. The Fifth Circuit reasoned that this constituted retention of a substantial degree of control and therefore this right to select settlement options constituted an incident of ownership which would require the policy to be taxed in the employee's estate under Section 2042(2).

Although *Lumpkin* was not a case in which the decedent-insured held incidents of ownership in a life insurance policy as a trustee or in a fiduciary capacity, the Fifth Circuit relied on its *Lumpkin* decision to decide in *Rose v. United States*, 511 Fed. 2d 259 (Fifth Cir. 1975), 1975-1 USTC #13,063, that life insurance proceeds are includable in the insured-decedent's gross estate if at the time of the insured's death, he can exercise incidents of ownership *even if only in a fiduciary capacity.*

Rose involved the taxation of life insurance policies purchased by the sole trustee of an *irrevocable* trust on the sole trustee's life where the decedent as trustee was made owner and beneficiary of each policy. In relying on *Lumpkin* to tax the insurance policies in *Rose*, the Fifth Circuit concluded that "by using the 'incidents of ownership' term, Congress was attempting to tax the value of life insurance proceeds over which the insured at death still possessed a substantial degree of control."

The Fifth Circuit thus concluded that the test for determining whether life insurance held in a fiduciary capacity was taxable turned on whether the decedent insured at his death "still possessed a substantial degree of control." If the decedent insured had any substantial degree of control, the policies would be taxable under the Fifth Circuit substantial control test whether or not the substantial control

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was possessed individually or strictly in a fiduciary capacity. Amplifying its position, the Fifth Circuit in *Rose* stated that fiduciary restraints over the exercise of the decedent's substantial control do not automatically deprive it of the substantially required for inclusion under Section 2042(2).

The Fifth Circuit in the instant case and in *Rose* unequivocally rejected the Sixth Circuit and Second Circuit decisions and the tests evolved by these circuits for determining the taxation of life insurance held solely in a fiduciary capacity.

The Sixth Circuit and Second Circuit in cases decided before *Lumpkin, Rose* and the instant case, concluded that the fact the decedent possessed incidents of ownership in a fiduciary capacity did not necessarily cause the proceeds to be includable in his estate for federal estate tax purposes.

The Sixth and Second Circuits recognized that normally where a trust owned life insurance policies, the trustees would necessarily have to have incidents of ownerships of the policies. However, according to their decisions, the proceeds were includable in the trustee's estate only if the incidents of ownership could be exercised for his own benefit.

Thus, under the Sixth and Second Circuit cases, where life insurance policies are owned solely as a trustee, in order to have taxability, (a) the trustee must have sufficient power or control over the policies as to constitute an incident of ownership in the policies, and (b) the trustee must be able to exercise the incidents of ownership *for his own benefit.*

The Sixth Circuit in *Estate of Fruehauf v. Commissioner,*

6 Cir. 1970, 427 F.2d 80 held that where the decedent possessed the requisite powers over policies on his life solely as a transferee in a fiduciary capacity, *with no beneficial interest therein,* such powers do not constitute incidents of ownership within the meaning of Section 2042 (2).

In *Skifter v. Commissioner,* 2 Cir. 1972, 468 F.2d 699, the Second Circuit held that even though the decedent had incidents of ownership as a trustee and possessed power to affect beneficial ownership of the policies as well as the proceeds therefrom, because these powers could not be exercised by decedent for his own benefit, the policies were not includable in his gross estate.

Thus, under the rule of the Second and Sixth Circuits, for policies held as trustee to be taxed, an insured trustee must be able to exercise the incidents of ownership powers held in a fiduciary capacity for his individual benefit. Under the rule of the Fifth Circuit, if the decedent had any substantial control as a trustee, the policies would be taxable and it is not necessary that he be able to exercise the incidents of ownership for his own personal benefit.

Where ownership is held as trustee only, any substantial control as trustee makes the policies taxable in the Fifth Circuit whereas in the other circuits, the proceeds are includable in a trustee's estate only if the trustee has substantial control over the policies and such powers could be exercised for the trustee's personal benefit.

In the instant case, the Fifth Circuit held that under its cases (*Lumpkin* and *Rose*), the right of Gilson as co-trustee to select a settlement option was a substantial power constituting an incident of ownership within the purview of Section 2042 (2) requiring taxation in Gilson's estate.

Recognizing the direct conflict of its ruling with the other circuits, the court below stated:

> "To the extent that *Skifter v. Commissioner*, 468 Fed. 2d 699 (Second Cir. 1972), and *Estate of Fruehauf v. Commissioner*, 427 Fed. 2d 80 (Sixth Cir. 1970), recognize a different rule, this circuit has chosen not to follow them." Page 7048, Note 3

Thus, the conflict between the decision below and the other circuits is direct and acknowledged by the Fifth Circuit and certiorari should be granted to resolve the conflict.

2) THE DECISION BELOW IS ONE OF GREAT NATIONAL IMPORTANCE AFFECTING THOUSANDS OF POLICIES AND NUMEROUS PRESENTLY PENDING TAX CASES AND AUDITS IN CIRCUITS WHICH HAVE NOT RULED ON THIS ISSUE.

Revocable living trusts, testamentary trusts and irrevocable trusts funded with life insurance are very common testamentary devices. Every citizen has the inherent right to know the tax consequences of disposition of his estate using one of these common methods. However, until the present conflict is resolved by this court, no such certainty is possible.

Based upon the calls and letters counsel has had from all over the country, it is apparent that the Commissioner is deciding all cases under the all encompassing taxability test of the Fifth Circuit except possibly in two circuits.

Unless this court resolves the conflict now, you will be requiring the litigants in every other circuit to litigate the

same issues through to their circuit courts of appeal. Because of the huge number of policies involved, particularly where irrevocable trusts have already been created, an enormous case load will be placed on the lower courts and circuit courts who have not decided the issues raised in this petition.

A denial of this petition will further encourage the Commissioner to follow the Fifth Circuit test forcing taxpayers to either concede or be faced with taking his case all the way to his Circuit Court of Appeal. Even then, if you deny certiorari here, the taxpayer will not know how many more cases must come to this court before you will decide to resolve the conflict.

We can expect Respondent to vigorously oppose certiorari as Respondent knows that few taxpayers have the fortitude and funds to undertake appeals to the Circuit Court level, much less to this court.

Simply, the conflict should be resolved now in this case which, by admission of the court below, squarely presents the conflict for final decision.

Lest this court feel that counsel is embellishing the importance and the number of cases involved, in the less than ninety days since *Terriberry* became final, there have been two more lower court decisions reported involving precisely the same issue. *Estate of Connelly, Sr. v. U.S.*, Dist. Ct. N.J. decided August, 1975, 75-2 USTC # 13091, involved the very same employee group insurance policy as was involved in *Lumpkin*. Judge Biunno wrote a powerful and comprehensive opinion reviewing the entire legislative history of Section 2042 in which he analyzed and completely rejected the rationale of the Fifth Circuit's *Lumpkin* and *Rose*

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decisions giving compelling reasons for his conclusions.

After observing the unsoundness of the Fifth Circuit position, Judge Biunno concluded that:

> "If *Rose* were to stand, no individual could safely serve as trustee of a trust. His trust powers would create the risk that on his death, the value of someone else's trust would be part of his own gross estate. Only banks and trust companies could afford to be trustees for their existence is perpetual. They do not die and they have no gross estate to be taxed.
>
> "*Rose* carries this risk because it creates a new anomaly by including trust life insurance but not other kinds of trust property, in the decedent's gross estate." 75-2 USTC Page 8867 - 59.
>
> *Connelly* is appealable to the Third Circuit.

Since *Connelly*, the United States Tax Court has decided *Estate of Anders Jordahl, et al v. Commissioner*, 65 TC # 8 (October 15, 1975). In *Jordahl*, the decedent created an irrevocable trust naming himself as one of three trustees. The corpus of the trust included insurance policies on the decedent's life and other assets. The decedent retained the right to substitute policies of equal value and the trust instrument vested the trustees with all right, title and interest in the policies and authorized them to "exercise and enjoy all options, rights and privileges therein and beneficial interest thereunder as fully and effectually as the donor might have done."

After observing that the powers that the decedent had were as trustee, the Tax Court held that the insurance proceeds were not includable in decedent's estate under Section 2042 (2) because the powers did not give him a right to the "economic benefits" of the policies.

Only the Government knows how many more cases are in the stream or about to come on stream involving this precise issue. We know that they are extremely numerous.

Finally, the interest and national importance in the issue is demonstrated by the numerous entire articles published in tax periodicals on these cases. See for example full articles in February, 1973 TAXES, P. 109, Spring, 1975 TAX LAWYER, P. 607 and November, 1975 THE JOURNAL OF TAXATION, P. 315.

Granting this writ of certiorari and finally resolving these questions will settle innumerable cases now in litigation or on appeal and will eliminate innumerable cases and controversies now in the audit stage which will eventually result in litigation.

3) THE DECISION BELOW HOLDING THAT THE TRANSFER OF INSURANCE POLICIES TO A REVOCABLE TRUST IS DEEMED TO TRANSFER TAXABLE INCIDENTS OF OWNERSHIP TO THE TRUSTEES CONFLICTS WITH EVERY EXISTING TAX CASE, STATUTE, REGULATION AND RULING.

The decision below is the first legal precedent in U. S. Tax history to hold that the creation of a revocable trust had any effect for any tax purpose.

Nancy, the grantor of the trust in the case below, specifically reserved the right to amend, modify, or revoke the trust at any time and also the right at any time to remove the decedent as a co-trustee without anyone's consent or approval and without any notice requirements. In fact, under Florida law, an oral revocation is recognized.

We challenged Government counsel from the trial court through oral argument to recite any case, ruling or regulation wherein it was ever held *or even suggested* that the creation of a revocable trust had any effect for any tax purpose. Despite these repeated challenges, the Government has failed to recite a single case, ruling or regulation wherein the creation of a revocable trust had any effect for any tax purpose.

On the contrary, all of the Government's own rulings and regulations state that the creation of a revocable trust has no tax effect, does nothing and is treated as if it did not exist. The creator or grantor of the trust by reason of having the power to revoke at any time, is deemed the owner for all tax purposes of the property despite the transfer of the same to a revocable trust.

The reason for this is simply because a person who can revoke a trust literally with the snap of a finger *retains total control* over the trust and its corpus and one who has such control has all of the tax consequences of ownership and is treated as the owner for all tax purposes. The District Court came to this conclusion as did the dissent in the court below.

The proposition is so elementary, basic and logical that until now, no one has seriously contended that the trustee of a revocable trust had such "substantial control" over the trust assets as would change any tax consequences.

The decision below directly conflicts with your cases relative to the effect of reserving a power to revoke in the estate, gift and income tax areas.

The first case on the effect of reserving the power to revoke a trust was *Reineke v. Northern Trust Co.*, 278 US 339, 49 S. Ct. 123, 73 L.Ed. 410 (1929). The issue before the court was whether certain inter vivos trusts created by the decedent were taxable. At that time, there was no statute equivalent to present Section 2038 of the Internal Revenue Code which provides that a decedent's estate shall include any trust over which he retains a power to revoke or amend.

The Government in *Reineke* relied on an estate tax statute which taxed transfers taking effect at death (now Section 2037) contending that two of the trusts over which the decedent reserved the power to revoke, were taxable as transfers taking effect at death. The Government reasoned that if a revocable trust was a transfer that really did *not* take effect until the decedent's death, at which time the power to revoke was extinguished, then such a transfer would be taxable.

The *Reineke* court found that two trusts under which the decedent retained a power to revoke were taxable to the decedent as transfers taking effect at death. The court reasoned that the transfer was not complete until the transferor's death if, during the transferor's lifetime, he reserved the power to revoke.

The *Reineke* court had little difficulty deciding that where a creator of a trust retained the power to revoke, *no transfer was deemed to have occurred during his lifetime.* Such a transfer occurred only at his death when the power to revoke was extinguished. Until such time, the

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transfer was not complete.

This court explained its matter of fact holding further in *Helvering v. City Bank Farmers Trust Co.*, 296 U.S. 85 56 S. Ct. 70, 80 L.Ed. 62 (1935). In this later case you stated clearly and concisely that where the grantor retains the power to revoke, the transfer of interests to a trust *are incomplete* and it is only when death occurs, that substantial interests passed from the grantor's control and are "for the first time" conferred on the transferees.

There has never been a contrary case or a modification thereof.

In fact, the rationale of *Reineke* has been applied in the gift tax and income tax area. In *Burnet v. Guggenheim*, 288 U. S. 280, 53 S. Ct. 369, 75 Lawyers Ed. 753 (1933), the issue was whether the creation of a revocable trust resulted in a taxable gift. You held that it did not because the transferor retained control over the property conveyed to the trustee as long as he could revoke the trust. You decided the same as to income taxes in *Corliss v. Bowers*, 281 U. S. 376, 50 S. Ct. 366, 74 Lawyers Ed. 916 (1930). Your conclusions have since been codified in Section 2038, 673, 676 (a) and 677 (a) of the Internal Revenue Code of 1954.

The majority below completely ignored the above cases cited to them. Without authority the court below simply stated that it was enough that on decedent's death, the trust was in existence and Nancy had not exercised her power to either revoke the trust or remove the decedent as trustee.

The Fifth Circuit did acknowledge that its conclusion was contrary to the recent Eighth Circuit decision in Swanson, Jr., et al v. Commissioner decided June, 1975.

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75-2 USTC # 9528. The *Swanson* court adopted the district court opinion in *Terriberry* reciting with approval that portion of the opinion holding that by retaining the right to amend, modify or revoke her trust and to remove the decedent as a co-trustee at any time, Nancy effectively retained all incidents of ownership in the subject policies as the grantor of said trust.

It is enough in the Fifth Circuit that property has been transferred to the trust and the absolute power to revoke the trust or to remove the trustee at any time is irrelevent. If this be the case, the decision below is authority for the Commissioner to tax any appreciated property that has been transferred to a revocable trust for income tax purposes, to treat the ultimate beneficiaries of the trust as donees of gifts, etc., because in each case, a transfer has been made, and the rights to revoke or amend at any time are deemed irrelevant by the Fifth Circuit.

There is not space here to quote all of the Commissioner's own estate, income and gift tax rulings disavowing this theory. Suffice to note that during the pendency of the instant case,the Commissioner rules in Revenue Ruling 73-584 I.R.B. 1973 - 52, 12 that the transfer of an installment obligation to a trust by a grantor who retained the right to revoke the trust is not a "disposition" of such obligation within the meaning of Section 453(d) of the Code because "he is treated as the owner of the entire trust under Section 676 of the Code."

The Fifth Circuit's decision ignoring the effect of Nancy's right to amend, modify or revoke the trust at any time is in direct conflict with all of your decisions referred to above, Sections 2038, 673,676 and 677 of the Code and the too

numerous to recite rulings and regulations of the Commissioner under these and other sections of the Code.

4) THE DECISION BELOW FAILED TO RECOGNIZE THAT THE RIGHT TO SELECT A SETTLEMENT OPTION HELD SOLELY IN A FIDUCIARY CAPACITY IS MERELY AN INVESTMENT POWER.

The court below concluded that decedent's right to select a settlement option as co-trustee gave him the right to vary the time or manner of enjoyment of the policies which required taxation under *Lumpkin* and the Commissioner's Regulations.

This finding ignores the fact that the various settlement options are merely actuarial equivalents of the value of the policy taken in a lump sum. They are merely a right to vary the investment and change its form. In the trust situation it is merely an investment power and no more. It is not an "incident of ownership."

An election by the trustees to have the policy proceeds paid in a lump sum which is then invested in a bond earning interest is no different than leaving the same lump sum with the insurance company under the interest settlement option. In both cases, the beneficiary receives interest income. The only difference is that in the first case it comes from the bond and in the second case, from the insurance company.

The point is that because the trust instrument itself governs the time and manner of enjoyment, the beneficiary will take the same income from the lump sum invested by the trustees in stocks or bonds as the beneficiary will take if

the same investment is made through the insurance company which provides actually three separate investment mediums under its optional modes of settlement.

In the trust situation, the trust instrument, under its distribution or accumulation provisions, determines the trustee's right to effect the time or manner of enjoyment. The mere right to select an optional method of settlement cannot effect the trust beneficiaries' rights unless the other provisions of the trust give the trustees these powers. Here, they did not.

The right to select a settlement option in Terriberry was purely an administrative power over the trust assets held in a fiduciary capacity and is not a taxable power. The contrary opinion of the court below conflicts with the principles recently affirmed by this court in *United States v. Byrum*, 408 U. S. 125 (1972) and the First Circuit in *Old Colony Trust Co. v. United States*, 423 F. 2d 601 (1970) which latter case held that no aggregation of purely administrative powers can meet the Government's amorphous test of "sufficient dominion and control" so as to be equated with ownership. Page 602, 603.

CONCLUSION

This case is simple, the conflict direct and the issues are of national importance affecting thousands of people.

For the reasons above, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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Sarasota, Florida 33577

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of December, 1975, three copies of the petition of writ of certiorari were mailed, postage prepaid, to Scott P. Crampton, Assistant Attorney General, and Jeffrey S. Bloom, Attorney, Tax Division, Department of Justice, Washington, D.C. 20530, Attorneys for Respondent. I hereby certify further that all parties required to be served have been served.

Curtis J. Timm
2041 Main Street
Sarasota, Florida 33577
Counsel for Petitioner

APPENDIX A

OPINION OF FIFTH CIRCUIT COURT OF APPEALS

Nancy C. TERRIBERRY, Bruce T. Terriberry and Sarasota Bank & Trust Co., on behalf of the Estate of G. Gilson Terriberry, Plaintiffs-Appellees.

versus

UNITED STATES of America, Defendant-Appellant

No. 74-2898

United States Court of Appeals, Fifth Circuit
Aug. 8. 1975.

Estate brought action to recover estate tax payment. The United States District Court for the Middle District of Florida, Ben Krentzman, J., rendered judgment for the estate and the United States appealed. The Court of Appeals, Clark, Associate Justice of United States Supreme Court (retired) sitting by designation, held that where husband, on whose life insurance policies were issued, had the right as a trustee to elect settlement options which allowed the policies' values to be paid out as annuities,husband had sufficient incidents of ownership in the policies to require that, following his death, the proceeds be included in his estate for tax purposes, notwithstanding the fact that the trust agreement expressly prohibited husband from exercising any of the incidents of ownership of the policies and the fact that his wife had an absolute power as grantor to revoke the trust or to remove her husband as trustee.

Reversed.

Ainsworth,Circuit Judge, dissented and filed opinion.

Internal Revenue

Where husband, on whose life insurance policies were issued, had right as trustee to elect settlement options which allowed life policies' value to be paid out as annuities, husband had sufficient incidents of ownership in policies to require that, following his death, proceeds be included in his estate for estate tax purposes, notwithstanding fact that trust agreement expressly prohibited husband from exercising any incidents of ownership of policies and fact that his wife had absolute power as grantor to revoke trust or to remove her husband as trustee. 26 U.S.C.A. (I.R.C. 1954). § 2042(2).

. . . . . .

Appeal from the United States District Court for the Middle District of Florida.

Before CLARK, Associate Justice*, and GOLDBERG and AINSWORTH, Circuit Judges.

Mr. Justice CLARK:

At issue on this appeal is some $16,000 in federal estate taxes paid by appellee, Mrs. Nancy Terriberry, upon the death of her husband, Gilson Terriberry, on seven insurance policies transferred to her some years ago and covering his life. Upon Gilson's death, the Government claimed that he had sufficient "incidents of ownership" in the policies within the meaning of 26 U.S.C. § 2042(2)[1] to require that the proceeds be included in his estate for tax purposes. Mrs. Terriberry paid the tax and brought this suit in United States

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* Of the Supreme Court of the United States (Retired), sitting by designation.

1. Section 2042 provides: "The value of the gross estate shall include the value of all property –. . .(2) To the extent of the amount receivable by all other beneficiaries as insurance under policies on the life of the decedent with respect to which the decedent possessed at his death any of the incidents of ownership, exercisable either alone or in conjunction with any other person.

District Court for the Middle District of Florida to recover the payment. The District Court concluded that the incidents of ownership were too remote to make the proceeds includable in Gilson's estate. Though recognizing the apparently good faith efforts of appellee and her late husband at the time of the original transfer to avoid this problem, we nevertheless hold the instant case controlled by In re: *Estate of Lumpkin*, 474 F.2d 1092 (5th Cir. 1973) and *Rose v. United States*, 511 F.2d 259 (5th Cir., 1975).

I.

The record stipulations indicate that in the 1940's Gilson transferred to his wife, Nancy, the absolute and sole ownership of seven insurance policies on his life worth some $115,000. Subsequently, the Terriberrys moved to Florida after his retirement. In 1964, having heard that probate costs were high, they inquired as to how the impact of such expenses might be lessened and were advised to create separate inter vivos, revocable trusts. Each of the Terriberrys wished to retain control of their respective estates but were advised that Florida law required that someone other than a grantor-beneficiary be named co-trustee of such a trust. A form of trust agreement was drawn by counsel in which Gilson and Nancy named each other as co-trustees of their respective trusts, along with the Sarasota Bank as successor trustee of each. Nancy desired to transfer the seven insurance policies to the trust. Before executing the trust instrument, she wrote to each of the two insurance companies who carried the policies, enclosing a copy of the agreement and advising them of her intentions. In a letter of June 15, 1964, she stated:

> The purpose of the wording for my Agreement is to make it clear that I have all the incidents of ownership of the policies on my husband's life and, without the consent

> of any Trustee(s) or beneficiary, may exercise any option, etc., given under these contracts. Should I predecease my husband, all incidents of ownership become vested in the Trustee(s) and further, if my husband is a Trustee or Co-Trustee, ownership will not vest in him as an individual but only in his representative capacity.

Five policies issued by Mutual Benefit, however, included special settlement options which allowed the policy value to be paid out as an annuity. Regarding these provisions, Nancy further stated in her letter to that company:

> As mentioned in my letter of March 3, while one or both of my husband and myself are living we might wish to take advantage of the very old annuity options in some or all of the contracts particularly in case of a violent inflation. These rates should be available to either the cash value or the maturity value. Your letter of March 5, indicates that these options and rates would be available under the arrangements we are preparing.

Mutual Benefit had earlier informed her:

> Ordinarily, settlement options are available only to beneficiaries who are natural persons taking in their own right and not to trustees or other fiduciaries. However, in your case if you or Mr. Terriberry were the trustee we would be willing at the surrender or maturity of the policy to permit such trustee to elect a settlement option based on your life or the life of your husband provided you or your husband, as the case may be, is then the beneficiary of the trust and the right to take such action is included in the trust. In such a situation, the one of you who acts would merely be electing an option as trustee for yourself instead of directly as an individual.

In response to the June letter, Mutual Benefit stated:

Mr. Stoddart [Associate Counsel of the Company] believes it would be more appropriate for you to transfer ownership of the policies on your life as well as on the life of your husband to the trustees at this time. We could then furnish papers for such ownership for your signature to become a part of the policies. Under such an agreement your signature would be required to any changes in the policies during your lifetime or if you were incompetent or deceased by the trustees acting at that time. The life income option in the policy contract would be available on your life,if living, otherwise on the life of your husband.

In July of 1964, Nancy executed the trust agreement and transferred the insurance policies to it. Included among the trust's provisions were the following:

"ARTICLE III

"The Grantor hereby agrees to transfer ownership of the life insurance contracts listed on the schedule of property attached hereto to the Trustee(s) in, but only in, its fiduciary capacity and not as individuals, and further to designate the individual and/or corporate Trustee(s) as the beneficiaries of such contracts of insurance. With respect to said insurance contracts, the Grantor agrees to pay the premiums and other charges, if any, necessary to keep such insurance in force without any duty on the part of any Trustee(s) herein named to see to the payment of same.

"With respect to said insurance contracts it is, however, expressly understood and agreed as follows:

"1. That the transfer of ownership by the Grantor to the Trustee(s) of such insurance contracts shall not vest ownership of such contracts in the Grantor's husband, G. Gilson

Terriberry, individually but only in his fiduciary capacity.

"2. That the Grantor's husband, G. Gilson Terriberry, in the administration and ownership of said contracts of insurance, as Trustee or Co-Trustee hereunder, is expressly prohibited from exercising any of the incidents of ownership thereof in his individual capacity and further prohibited from making any use, disposition, retention or other control thereof, either individually or as Trustee or Co-Trustee, except as herein directed.

"3. To the extent permitted by the contracts of insurance and the insuring companies, but only to the extent that ownership of the contracts of insurance shall not become vested in the Grantor's husband, G. Gilson Terriberry as an individual, the Grantor and her husband, G. Gilson Terriberry, or either of them, as Trustee(s) may upon surrender or maturity of the insurance contracts elect a settlement option based upon the life of either the Grantor or her said husband, G. Gilson Terriberry, Provided, they or either of them are, at the time of the election of such settlement option, a beneficiary of the trust."

In addition,the agreement provided in Article II that Nancy had the unfettered right to revoke or amend her trust or to remove any trustee at any time.

The settlement option was never exercised, and Gilson died on May 21, 1968. The Government assessed all seven policies as his property and this suit followed.

II.

The Internal Revenue Service has issued regulations interpreting 26 U.S.C.§ 2042(2), in part, as follows:

(4) A decedent is considered to have an "incident of

> ownership" in an insurance policy on his life held, in trust if, under the terms of the policy, the decedent (either alone or in conjunction with another person or persons) has the power (as trustee or otherwise) to change the beneficial ownership in the policy or its proceeds, or the time or manner of enjoyment thereof, even though the decedent has no beneficial interest in the trust. Moreover, assuming the decedent created the trust, such a power may result in the inclusion in the decedent's gross estate under section 2036 or 2038 of other property transferred by the decedent to the trust if, for example, the decedent has the power to surrender the insurance policy and if the income otherwise used to pay premiums on the policy would become currently payable to a beneficiary of the trust in the event that the policy were surrendered.

Applying this approach to the circumstances of the instant case, the Government takes the position that Gilson's right as a trustee to elect a settlement option under Article III(3) of the trust agreement is a power to change "the time or manner of enjoyment" of the insurance policy and is therefore an "incident of ownership" under § 2042(2). We agree. Under recent precedent in this Circuit, appellee cannot escape the inexorable sweep of that provision of the Code.

Two years ago, this Circuit held that the proceeds of an insurance policy was includable in the gross estate even though the only power exercisable by an insured was the right to elect among certain limited settlement options. *In re Estate of Lumpkin*, 474 F.2d 1092 (5th Cir. 1973). More recently, in *Rose v. United States*, 511 F.2d 259 (5th Cir. 1975), Judge Goldberg concluded that an insured cannot relieve himself of liability under § 2042(2) by transferring

ownership of the policies to a trust and merely assuming a fiduciary capacity as a trustee. The facts in the instant case lie at the logical junction of *Rose and Lumpkin,* and no significance can be attached to the intervention of a third party as trust grantor.

Appellee strenuously urges that Art. III(2) of the trust agreement expressly prohibited her husband "from exercising any of the incidents of ownership" of the policies and that, hence, he was effectively prevented from electing any settlement option. We cannot accept appellee's ingenious nullification of the express provisions of Article III(3) by this proferred reliance on Article III(2)'s all-purpose incantation or on its sister phrases in Article III(1) or III(3). Similarly we are unpersuaded by the existence of an absolute power in Nancy as grantor to revoke the trust or to remove her husband as trustee. The critical moment is the date of decedent's death. *cf. Lober v. United States,* 346 U.S. 335,74 S.Ct. 98, 98 L.Ed. 15 (1953), and it is enough that the power remained in existence at that point, even though unused an and defeasible, *cf. Johnstone v. Commissioner,* 76 F.2d 55 (9th Cir. 1935). The fact of the matter is that she did not remove him as trustee and he died, possessed of a power to affect the time and manner of enjoyment of the proceeds of a life insurance policy on his own life.[2] Under our cases,[3] this brings the situation within § 2042(2), and we are obliged to reverse.

Reversed.

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2. The estate failed to introduce any evidence to show that similar lifetime settlement options were not available with respect to the two Connecticut Mutual policies, as it was of course obliged to do if it were to show its entitlement to a refund.

3. To the extent that *Skifter v. Commissioner,* 468 F.2d 699 (Second Cir. 1972), and *Estate of Fruehauf v. Commissioner,* 427 F.2d 80 (6th

AINSWORTH, Circuit Judge (dissenting):

I am unable to concur in the majority opinion because of being in fundamental disagreement with the holding that decedent had incidents of ownership in the life insurance policy at the time of his death. I also disagree that the case is controlled by this Court's prior decisions in In re: Estate of Lumpkin, 5 Cir., 1973, 474 F.2d 1092, and Rose v. United States, 5 Cir., 1975, 511 F.2d 259. The peculiar facts and circumstances of the present case are greatly dissimilar to those in the cited cases.

The carefully detailed opinion of District Judge Krentzman is attached hereto and represents my views in dissent. Judge Krentzman distinguished both *Lumpkin and Rose* (District Court decision). Subsequently, this Court affirmed the District Court in *Rose*.

This case differs from the cited cases especially in the fact that the Terriberry trust herein was revocable. In Rose the trusts were irrevocable. In *Lumpkin* there was no fiduciary relationship as here and in *Rose;* also *Lumpkin* had the right under the optional settlement provisions of the policy to vary the time and manner in which the proceeds would be paid to the beneficiary after his death. We held that such right was an incident of ownership within the purview of Section 2043.

Here, the Terriberry trust was revocable and Nancy Terriberry retained the right to amend, modify or revoke her trust and to remove the decedent as a co-trustee at any time.

Cir. 1970), recognize a different rule, this Circuit has chosen not to follow them. See *Lumpkin, supra,* 474 F.2d at 1097, n.18. Nor is the Eighth Circuit's decision in *Swanson Jr. et al. v. Commissioner,* --- F.2d ---- apposite to the instant case.

Thus she effectively retained all incidents of ownership in the policies as the grantor of the trust, and none was possessed by the decedent.

APPENDIX

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This is a suit brought by plaintiffs against the United States for the recovery of federal estate taxes of $16,605.18 plus statutory interest thereon, representing additional estate taxes resulting from the inclusion of seven insurance policies on decedent's life in his taxable estate.

The question presented for determination is whether the decedent had sufficient incidences of ownership in the seven life insurance policies on his life, which incidences of ownership were held in a fiduciary capacity, to cause the policy proceeds to be taxable in decedent's estate for federal estate tax purposes under Section 2042 of the Internal Revenue Code of 1954.

The issue was submitted for decision on stipulated facts and memoranda and argument of counsel The Court has considered the same and finds:

FINDINGS OF FACTS

1. G. Gilson Terriberry (hereinafter referred to as "decedent") died on May 21, 1968.

2. Prior to July 23, 1964, decedent's wife, Nancy C. Terriberry, (hereinafter referred to as "Nancy"),was the absolute owner of the seven insurance policies on decedent's

life in issue and decedent had no incidences of ownership of any type in said policies.

3. Prior to 1964, decedent and his wife moved to the State of Florida. They were advised that the cost of probate administration of an estate in Florida was very high and that such costs could be eliminated if each created a revocable trust and placed all of his or her assets in such trusts. They were further advised that such a trust would not be legal or valid in the State of Florida if each was the sole grantor, sole trustee and sole beneficiary of his or her trust and that if each desired to also be a trustee of his or her trust, it would be necessary that a co-trustee also be selected.

4. Pursuant to such advice and to avoid probate administration and to retain control over her individual assets, on July 23, 1964, Nancy as grantor entered into a revocable trust agreement with herself and the decedent as co-trustees and the Sarasota Bank and Trust Company as successor co-trustee. Nancy appointed the decedent as co-trustee of her trust solely for convenience to insure that said revocable trust was valid under Florida law.

5. Prior to establishing her revocable trust, Nancy had expressed a desire to transfer the seven life insurance policies which she owned on the life of her husband to said trust so that if she predeceased her husband, these life insurance policies would not be in her probate estate and thus subject to probate expenses.

6. In a letter to the Mutual Benefit Life Insurance Company (the issuer of five of the policies in issue) dated June 15, 1964, she enclosed a copy of the proposed revocable trust agreement she would execute and referred the insurance company particularly to Article III which pertained to life

insurance policies transferred to the trust and the rights and ownership of the trustees therein. She stated in said letter that:

> "The purpose of the wording for my agreement is to make it clear that I have all the incidences of ownership of the policies on my husband's life and, without the consent of any trustee(s) or beneficiary, may exercise any option, etc. given under these contracts." (This is a quote from letter Exhibit 19.)

7. On June 21, 1964, Nancy wrote a similar letter to Connecticut Mutual Life Insurance Company, the issuer of the other two policies, enclosing a draft of the trust agreement and indicated that the purpose of the wording for her trust was to insure that she would have all incidences of ownership of the policies on her husband's life.

8. In response to Nancy's correspondence,Mutual Benefit indicated as to the five policies on decedent's life, owned by Nancy that even after transfer of ownership of said policies to said trust, Nancy's signature would be required to make any changes in the policies during her lifetime. Connecticut Mutual in its correspondence indicated that a provision should be made for the disposition of the policies in the event the trust was not in existence at the time of the insured's death.

9. Nancy's trust was created on July 23, 1964, and the seven insurance policies were subsequently transferred to said trust, subject to the provisions of such trust agreement and were immediately deposited with the Sarasota Bank & Trust Company as agent for the trustees under an agency agreement and were in the possession of the Sarasota Bank and Trust Company under the agency agreement at the time

of decedent's death.

10. Under Nancy's trust, the rights and powers of decedent as a co-trustee in respect to the seven insurance policies were set forth in Sections 1, 2 and 3 of Article III of said trust and are set forth verbatim hereafter.

"1) That the transfer of ownership by the Grantor to the Trustee(s) of such insurance contracts shall not vest ownership of such contracts in the Grantor's husband, G. Gilson Terriberry, individually, but only in his fiduciary capacity."

"2) That the Grantor's husband, G. Gilson Terriberry, in the administration and ownership of said contract of insurance, as trustee or co-trustee hereunder, is expressly prohibited from exercising any of the incidences of ownership thereof in his individual capacity and further prohibited from making any use, disposition, retention or other control thereof, either individually, or as trustee or co-trustee, except as herein directed."

"3) To the extent permitted by the contracts of insurance and the insuring companies, but only to the extent that ownership of the contracts of insurance shall not become vested in the Grantor's husband, G. Gilson Terriberry as an indivdual, the Grantor and her husband, G. Gilson Terriberry, or either of them, as Trustee(s) may upon surrender or maturity of the insurance contracts elect a settlement option based upon the life of either the Grantor or her said husband, G. Gilson Terriberry; provided, they or either of them, are, at the time of the election of such settlement option, a beneficiary of the trust."

11. Article V of Nancy's trust further provided that decedent could never act as sole trustee and Article II provided that Nancy had the right to revoke or amend the trust at

any time without the consent of anyone and that she further had the right at any time to remove any trustee under said trust agreement.

12. Nancy's trust and the agency agreement thereunder were in effect at the time of decedent's death.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over this matter by virtue of the provisions of 28 U.S.C. Section 1346(2).

2. Section 2042 of the Internal Revenue Code covers the estate taxation of proceeds of life insurance. Subparagraph (2) of such section provides that the value of the gross estate shall include the value of life insurance receivable by beneficiaries other than the insured to the extent with respect to which the decedent possessed at his death any of the incidences of ownership exercisable either alone or in conjunction with any other person.

3. Treasury Regulations, Section 20.-2042-1(c)(2) defines the term "incidences of ownership" as follows:

> ". . . generally speaking, the term has reference to the right of the insured or his estate to the *economic benefit* of the policy." (underlining (or italics) supplied)

4. Subsection (4) of Section 2042-1(c) of the same regulation provides that a decedent is considered to have an incidence of ownership in an insurance policy on his life held in trust if the decedent (alone or in conjunction with another person or persons) has power to change the beneficial ownership in the policy or its proceeds even though decedent had no beneficial interest in the trust.

5. The scope of this particular subsection of the regulation has been narrowed by recent judicial interpretation, first in *Estate of Fruehauf v. Commissioner*, 426 F.2d 80 (C.A. 6 1970) and later in *Estate of Skifter v. Commissioner*, 468 F. 2d 699 (C.A. 2 1972). The Sixth Circuit in *Fruehauf* hold that mere possession by decedent of any powers in the nature of incidences of ownership in a fiduciary capacity does not invariably require inclusion of the proceeds of the policy on decedent's life in his gross estate and where the decedent possesses the requisite powers over policies on his life solely as a transferree in a fiduciary capacity, with no beneficial interest therein, such powers do not constitute incidences of ownership within the meaning of Section 2042(2). In *Skifter*, decided after *Fruehauf*, the Tax Court held that even though the decedent as a trustee in that case possessed power to affect beneficial ownership of the policies as well as the proceeds therefrom, none of the powers could have been exercised by decedent for his own benefit. The Second Circuit in *Skifter* rejected the Commissioner's argument that his Regulation 20.-2042(1)(c)(4) required the inclusion of said policies in decedent's estate because such regulation covered ownership as a trustee. In *Skifter*, the decedent at the time of his death was the sole trustee of an irrevocable trust for the benefit of his wife's daughter which included life insurance policies on his life. The Second Circuit rejected this contention noting that although such powers might well constitute an incidence of ownership if retained by the assignor of the policies, "it is not an incidence of ownership within the intended meaning of Section 2042 when it has been conveyed to the decedent long after he had divested himself of all interest in the policies and when he cannot exercise the power for his own benefit." (CCH Page 8600)

6. The Government relies on the District Court case of

Rose v. United States, 5 Cir., 511 F.2d 259 which relies on the rule set forth by the Fifth Circuit in the *Estate of Lumpkin*, 474 F.2d 1092 that the mere possession of an incidence of ownership will cause the policy proceeds of an insurance policy to be taxable in the decedent's estate and that the manner and capacity in which he possessed it are immaterial. It is noted here that although the *Lumpkin* case involved estate taxation of life insurance, it did not involve ownership of life insurance in a fiduciary capacity as does the present case. The decedent in *Lumpkin* was an employee of a large oil company and as such was covered by a non-contributory group term life insurance policy. Under the optional settlement provisions of the policy, the decedent had the right to vary the time and manner in which the proceeds would be paid to the policy-designated beneficiaries after his death. The Fifth Circuit held that such right was an incidence of ownership within the purview of Section 2042 causing the includability of the group life insurance proceeds in his taxable estate even though decedent could not benefit himself or his estate by exercising such rights.

7. The fact in *Lumpkin* were so different from the facts in the case at bar and the similar fact situations in *Fruehauf and Skifter* that the Fifth Circuit in deciding *Lumpkin* had no occasion to rule on the question of incidences of ownership held in a fiduciary capacity. This is clearly demonstrated by the fact that although *Lumpkin* was decided after *Skifter and Fruehauf*, neither landmark case in this area is even mentioned or cited in the *Lumpkin* opinion. Thus, *Lumpkin* is no authority for the instant case.

8. In *Rose* the District Court relied on *Lumpkin* without distinguishing the reasoning and discussions of the issues by the Sixth Circuit in *Fruehauf* and the Second Circuit in *Skifter*.

9. Although *Rose* is a case involving incidences of ownership of life insurance policies held in a fiduciary capacity, the facts in *Rose* are distinguishable from the facts in this case. The decedent in *Rose* was the sole trustee. In the instant case, decedent was merely a co-trustee to meet the legal requirements of a grantor trust in the State of Florida. In *Rose*, the ownership of the three insurance policies was absolutely vested in the decedent even though in a fiduciary capacity.

10. The decedent in *Rose* had the following powers in respect to the insurance policies:

A. Power to pay income of the trust after the beneficiaries reached eighteen (18) years.

B. Power to convert the policies to ten (10) pay life or endowment policies.

C. Power to withdraw dividend accumulations or surrender dividends for cash value.

D. Power to borrow on the policies.

E. Power to cancel the policies.

F. Power to change the beneficial ownership.

There were no limitations in *Rose* on the decedent's sole trustee's powers in the trust instrument over the subject insurance policies. In this case, the decedent as a co-trustee was specifically denied these powers.

11. The insurance companies in *Rose* apparently recognized the decedent sole trustee as the sole owner of the subject

policies whereas the insurance companies in the present case, particularly Mutual Benefit, concluded that even after the transfer of the policies to Nancy's trust, nothing could be done with the subject policies without her signature. Finally, the trusts over which the decedent was sole trustee in *Rose* were irrevocable whereas in the instant case, Nancy's trust was a revocable grantor trust.

12. In Nancy's trust, she reserved the right to amend or revoke the trust at any time. She reserved the right to remove any trustee at any time including the decedent. Thus, decedent continued to act as trustee at the whim of his wife and could be removed literally at the snap of her finger.

13. The specific limitations contained in Article III of Nancy's trust denying decedent the right to exercise any incidence of ownership effectively prohibited decedent from possessing incidences of ownership in the life insurance policies as would make the value thereof includable in his gross estate for estate tax purposes.

14. Assuming that the new and broader test for includability of insurance policies held in a fiduciary capacity set forth in *Rose* is correct, because the trust in this case is a revocable or grantor trust, the grantor, Nancy, is treated as the owner for all tax purposes of the trust corpus and thus of the subject insurance policies. See Section 2038 of Internal Revenue Code as to estate taxes and Section 677(a) and Section 673(a) of Internal Revenue Code as to income taxes. This treatment of the grantor of a revocable trust as the owner by the Government was most recently again affirmed in Revenue Ruling 73-584, I.R.B. 1973 - 52, 12 where the Service held that the transfer of an instalment obligation to a revocable trust created by the transferor did not result

in a "disposition" because the grantor as a result of his power to revoke is treated as the owner of the entire trust.

15. Under the new and broader test for includability of insurance policies held in a fiduciary capacity set forth in *Rose*, the seven policies would still not be includable in decedent's estate. A grantor of a revocable trust containing the provisions of Nancy's trust is treated for all tax purposes as the owner of the trust corpus which here includes the seven insurance policies. Conversely, the mere assignment of an insurance policy to a trust in which the owner retains the right of revocation or the mere naming of the trust as a beneficiary under an insurance policy is insufficient to remove the policies from the grantor's estate. Section 2038, Internal Revenue Code.

16. By retaining the right to amend, modify or revoke her trust and to remove the decedent as a co-trustee at any time, Nancy effectively retained all incidences of ownership in the subject policies as the grantor of said trust. The treatment of the grantor of a revocable trust as the owner of the trust corpus is required by Section 2038 of the Internal Revenue Code as to estate taxes and Sections 673 and 677 of the Internal Revenue Code as to income taxes. The decedent's appointment as a co-trustee could have been terminated at any time and he thus had no real power or authority over the subject insurance policies equivalent to an incident of ownership under Section 2042. The transfer of the insurance policies on decedent's life from Nancy to her revocable trust created no income, gift or estate tax consequences and such transfer is treated for tax purposes, in effect, as not being made.

17. For the foregoing reasons, plaintiff is entitled to re-

cover from defendant the sum of $16,605.08 plus statutory interest and their costs.

18. Judgment will be entered accordingly.

It is so ordered this 16 day of May, 1974.

s/ Ben Krentzman
Ben Krentzman,
U. S. District Judge

A true copy
Test: EDWARD W. WADSWORTH
Clerk, U.S. Court of Appeals, Fifth Circuit

By s/ Clare F. Sachs
Deputy
New Orleans, Louisiana
Dec. 4, 1975
(S E A L)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1974

No. 74 - 2898

D.C. Docket No. CA 73-65 T-K

NANCY C. TERRIBERRY, ET AL.,
Plaintiffs-Appellees,

versus

UNITED STATES OF AMERICA,
Defendant-Appellant

Appeal from the United States District Court for the Middle District of Florida

Before CLARK, Associate Justice* , and GOLDBERG and AINSWORTH, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed;

*Of the Supreme Court of the United States (Retired), sitting by designation.

It is further ordered that plaintiffs-appellees pay to defendant-appellant, the costs on appeal to be taxed by the Clerk of this Court.

August 8, 1975

AINSWORTH, Circuit Judge, dissenting.

Issued as Mandate: Oct 1, 1975

A true copy
Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit

By: s/ Clare F. Sachs
Deputy
New Orleans, Louisiana
Dec 4 1975

(S E A L)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 74-2898

U.S. Court of Appeals
Filed - Sep. 23, 1975
EDWARD W. WADSWORTH - Clerk

NANCY C. TERRIBERRY, ET AL.,
Plaintiffs-Appellees,

versus

UNITED STATES OF AMERICA,
Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Florida

ON PETITION FOR REHEARING

(September 23, 1975)

Before CLARK, Associate Justice *, GOLDBERG and AINSWORTH, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

Judge Ainsworth, Circuit Judge, dissents from the denial

*Of the Supreme Court of the United States (Retired), sitting by designation.

of the petition for rehearing.

A true copy
Test: EDWARD W. WADSWORTH
Clerk, U.S. Court of Appeals, Fifth Circuit

By: s/ Clare F. Sachs
Deputy
New Orleans, Louisiana
Dec 4, 1975
(S E A L)

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-865

NANCY C. TERRIBERRY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The question presented in this federal estate tax case is whether the decedent possessed "incidents of ownership" in insurance policies on his life because of his power as co-trustee of a trust to elect certain settlement options under the policies which he transferred to the trust. The decision below held that such power was an "incident of ownership" so that the proceeds of the policies were includable in the decedent's gross estate under Section 2042 of the Internal Revenue Code of 1954.

The pertinent facts are as follows: In the 1940's, the decedent transferred ownership of seven insurance policies on his life to his wife. In 1964, however, in order to avoid the high probate costs prevalent in Florida, the decedent and his wife decided to transfer their respective estates to separate *inter vivos* trusts. Although the decedent and his wife wanted to retain personal control over their estates,

Florida law did not permit them to name themselves as sole trustee of their respective trusts. Accordingly, they each settled upon the plan of naming the other to act as co-trustee (Pet. App. 25, 32-33).

In the revocable *inter vivos* trust created by decedent's wife, she named herself and decedent as co-trustees, named herself income beneficiary and provided for the disposition of the property upon her death to certain beneficiaries. Article III of the trust instrument granted decedent, as trustee, certain powers over insurance policies on his life. In pertinent part, the trust provided that—

> * * * the Grantor and her husband, G. Gilson Terriberry, or either of them, as Trustee(s) may upon surrender or maturity of the insurance contracts elect a settlement option based upon the life of either the Grantor or her said husband, G. Gilson Terriberry; Provided, they or either of them are, at the time of the election of such settlement option, a beneficiary of the trust.

(Pet. App. 27-28, 34-36; R. 53-67).[1]

In 1968, the decedent died survived by his wife. At the time of his death, the decedent still held the position of co-trustee of his wife's trust and that trust still owned the insurance policies on decedent's life (Pet. App. 28, 36). On audit, the Commissioner of Internal Revenue determined that the date-of-death value of the policies was includable in his estate because the decedent's powers to elect the settlement options on the policies constituted "incidents of ownership" within the meaning of Section 2042 of the Code.

In this refund suit brought by petitioner, decedent's executor, the district court rejected the Commissioner's

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[1] "R." refers to the record appendix in the court of appeals.

position. It held (Pet. App. 32-42) that the decedent's power as co-trustee did not constitute an "incident of ownership." The court of appeals reversed, with one judge dissenting (Pet. App. 23-42). It concluded that the decedent's powers under the trust instrument to elect the policies' settlement options and thereby determine the "time or manner of enjoyment" of the policies was an "incident of ownership" under Section 2042 which decedent possessed at the time of his death. Accordingly, it held the proceeds of the policies were includable in decedent's gross estate.

1. Section 2042(2) of the Code provides if a decedent "possessed at his death any of the incidents of ownership" of insurance policies upon his life, the value of the proceeds of those policies is includable in his gross estate. The statute does not enumerate the various types of "incidents of ownership" that could pertain to an insurance policy. As the congressional committees noted when considering the predecessor to Section 2042, "it is impossible to include an exhaustive list." H.R. Rep. No. 2333, 77th Cong., 2d Sess., p. 163 (1942); S. Rep. No. 1631, 77th Cong., 2d Sess., p. 235 (1942). However, the committee reports provided the following "nonexhaustive" list of powers encompassed within the term "incidents of ownership" (*ibid.*):

> Examples of such incidents are the right of the insured or his estate to the economic benefits of the insurance, the power to change the beneficiary, the power to surrender or cancel the policy, the power to assign it, the power to revoke an assignment, the power to pledge the policy for a loan, or the power to obtain from the insurer a loan against the surrender value of the policy. Incidents of ownership are not confined to those possessed by the decedent in a technical legal sense. For example, a power to change the beneficiary reserved to a corporation of which the decedent is sole stockholder is an incident of ownership in the decedent.

Thus, the focus of congressional concern was upon all powers which would affect the disposition of the proceeds of the policy.

The long-standing Treasury Regulations promulgated under Section 2042 implement this congressional intent. These Regulations (Treasury Regulations on Estate Tax (1954 Code), § 20.2042-1(c) (4)) provide —

> A decedent is considered to have an "incident of ownership" in an insurance policy on his life held in trust if, under the terms of the policy, *the decedent (either alone or in conjunction with another person or persons) has the power (as trustee or otherwise) to change* the beneficial ownership in the policy or its proceeds, or *the time or manner of enjoyment thereof,* even though the decedent has no beneficial interest in the trust. * * * [emphasis supplied].

In view of the intention of Congress to encompass the entire range of powers over the disposition of the proceeds of insurance policies, the decision below correctly concluded that the decedent's powers over the policies on his life were "incidents of ownership" within the meaning of Section 2042. Here, under the trust, the decedent had the power to grant immediate, rather than deferred, enjoyment of the policies and thus vitally to affect the "time or manner of enjoyment" of the insurance within the meaning of the Regulations. *In re Estate of Lumpkin,* 474 F.2d 1092 (C.A. 5). *Contra: Estate of Connelly* v. *United States,* 398 F. Supp. 815 (D. N.J.), appeal pending, C.A. 3, No. 76-1149. As this Court has noted in an analogous context, the power to control the time of enjoyment of property "is a significant power," *United States* v. *O'Malley,* 383 U.S. 627, 631. See also *Lober* v. *United States,* 346 U.S. 335. Since the decedent's power to elect the settlement options could affect the time for disposition of the proceeds of the policies, the decision below correctly held that such a power was an "incident of ownership" within the meaning of Section 2042.

Contrary to petitioners' argument (Pet. 15-20) and the dissent in the court below (Pet. App. 31), there is no justification for disregarding the decedent's power over the policies on the ground that his wife's trust was revocable. Section 2042 requires that those policies over which decedent "possessed at his death any of the incidents of ownership" be included in his estate without regard to whether those powers are revocable. Here, the decedent fully "possessed" the powers "at his death" because his wife had never exercised her power to remove him or to revoke the trust. Cf. *W. & W. Fertilizer Corp.* v. *United States*, Ct. Cl., No. 17-74, decided December 17, 1975. Moreover, the decedent's authority over the policies was not fettered by any obligations imposed by his fiduciary status. His wife explicitly granted him full discretionary authority over the matters she ceded to his control.

Accordingly, there is no practical basis for distinguishing the decedent's powers as co-trustee from similar powers held in an individual capacity. Since the decedent's powers were freely and fully exercisable by him at the date of his death, he "possessed" them within the meaning of Section 2042. *Rose* v. *United States*, 511 F.2d 259 (C.A. 5); see H.R. Rep. No. 2333, *supra*, at p. 163.

2. Petitioner contends (Pet. 7-12) that the decision below conflicts with either *Estate of Fruehauf* v. *Commissioner*, 427 F.2d 80 (C.A. 6), or *Estate of Skifter* v. *Commissioner*, 468 F.2d 699 (C.A. 2). In *Fruehauf*, the decedent's wife applied for, paid for and owned insurance policies on the decedent's life. Upon her death, she left the policies to a trust, in which the decedent was the income beneficiary. The decedent was one of the trustees of the trust which specifically authorized the trustees to sell the policies or surrender them for their cash surrender value. The Sixth Circuit agreed with the Commissioner's determination that the decedent's powers over the policies constituted "incidents of ownership" under Section 2042. The

decedent had the authority to exercise his power as trustee for his individual economic benefit by converting the nonproductive policies into income-producing properties and thus increasing the value of his own income interest. Because of this possibility of economic benefit, the Sixth Circuit concluded that the decedent's fiduciary powers were "incidents of ownership." In dictum the court stated (427 F.2d at 85) that not every power held by a decedent in a fiduciary capacity would come within the statutory term "incidents of ownership."

As in *Fruehauf*, the decedent in this case had the power to change the nonproductive life insurance policies into assets generating current income from which he might have benefitted personally because he was a contingent income beneficiary under the trust. Although the possibility for personal enrichment here may have been less direct than in *Fruehauf*, the potential for such economic benefit was nonetheless present. While we submit that the decision below correctly held that includability of a life insurance policy should not turn on whether the decedent can direct the benefits of insurance to his own economic benefit, the possibility of economic benefit in this case was sufficient to classify the decedent's powers as "incidents of ownership" even under the *Fruehauf* rationale.

The possibility that the decedent might receive economic benefit as a result of his exercise of his powers over the policies similarly distinguishes this case from *Estate of Skifter* v. *Commissioner*, *supra*. There, the decedent had transferred to his wife all of his interest in nine insurance policies on his life. Upon his wife's death, she left the policies to a trust of which the decedent was trustee. As trustee, the decedent was given the power to distribute the policies to the income beneficiary and the power to sell or surrender the policies and reinvest the proceeds.

After observing that it was "significant" that there was "no way in which [the decedent] could have exercised his powers to derive for himself any economic benefit from [the] insurance policies" (468 F.2d at 702), the court concluded that the decedent's powers as trustee were not "incidents of ownership" under Section 2042. Unlike the situation in *Skifter*, the decedent here, as we have pointed out, was a contingent beneficiary of the trust holding the insurance policies. Thus, the exercise of his powers to employ the settlement options under the policies might have resulted in his receipt of economic benefit.

After analyzing the case in terms of the "significant" fact that the decedent could not have benefitted from the exercise of his fiduciary powers, the Second Circuit in *Skifter* expressed the view (468 F.2d at 702) that Congress intended Section 2042 "to parallel the statutory scheme governing the interests and powers that will cause other types of property to be included in a decedent's estate" under Section 2036 (transfers with retained life estate), Section 2037 (transfers taking effect at death), Section 2038 (revocable transfers), and Section 2041 (powers of appointment). Because the decedent's fiduciary powers would not have triggered inclusion of the other trust assets in the decedent's estate, the court reasoned that Section 2042 should not be construed to reach the insurance policies.

As we have stated, we believe that the decision below correctly interpreted Section 2042 as an independent provision which does not turn on the possibility of economic benefit to the decedent as a result of the exercise of his powers. However, in concluding that none of the more general estate tax provisions was applicable,[2] the Second

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[2] In so concluding, the Second Circuit interpreted Section 2038 quite narrowly. That provision requires that property which a decedent has transferred before his death be included in his taxable estate if, at the date of his death, enjoyment of the property was subject to change

Circuit in *Skifter* acknowledged that "[i]f the power had been exercisable for the benefit of decedent, or for the benefit of whomever the decedent selected, it would have been necessary to include the [insurance] proceeds in the estate; for there would [have been] a powerful argument that this was an incident of ownership since he would have had the equivalent of a [Section 2041] power of appointment * * *" (468 F.2d at 703). In light of the foregoing statement, the possibility of economic benefit to the decedent here makes it likely that the Second Circuit would have held that the insurance proceeds in this case were part of the gross estate under Section 2042. There is accordingly no conflict of decisions "on the same matter" within Rule 19(1)(b) of the Rules of this Court.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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by reason of the decedent's exercise of a power to alter, amend, revoke or terminate. In *White* v. *Poor*, 296 U.S. 98, this Court held that this statute did not attach to property over which the decedent had acquired such a power through the action of unrelated persons, rather than through a reservation of authority attached to the gift. However, in Section 805 of the Revenue Act of 1936, 48 Stat. 1744-1745, Congress amended the provision so that it explicitly covered all powers, "without regard to when or from what source the decedent acquired such power." Despite the terms of the statute, the court in *Skifter* viewed the amendment as applying only to the exact situation at issue in *White* v. *Poor*, in which a power the decedent had originally created thereafter came under her control in exactly the terms in which she had originally created it.